



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 7, 1998

Mr. Jonathan Kaplan
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR98-1596

Dear Mr. Kaplan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 116210.

The City of San Antonio (the "city") received a request for "[a]ll applications from sexually oriented businesses seeking an amortization hearing before the Board of Adjustment following the enactment of Ordinance 82135 on April 27, 1995." You contend that the requested information is confidential pursuant to Open Records Decision No. 624 (1994), which discusses the confidentiality provisions of sections 111.006, 151.027, and 171.206 of the Tax Code. You have submitted a representative sample of the requested information for our review.¹

Section 552.101 of the Government Code excepts from required public disclosure information that is confidential by law, including information made confidential by statute. The submitted information includes several federal tax return forms. Information collected by the Internal Revenue Service regarding a taxpayer's liability is rendered confidential by title 26, section 6103(a) of the United States Code. Open Records Decision No. 600 (1992). Thus, you must withhold all federal tax return forms.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 111.006 of the Tax Code makes the following information confidential:

- (1) a federal tax return or federal tax return information required to have been submitted to the comptroller with a state tax return or report; and
- (2) all information secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer.

Tax Code § 111.006(a). The requested information does not appear to be information that had been required to be submitted to the comptroller with a state tax return, or is it information obtained by the comptroller or attorney general. Accordingly, section 111.006 is inapplicable in this instance.

Next, section 151.027(b) of the Tax Code provides confidentiality for information collected under the Limited Sales, Excise, and Use Tax Act and reads as follows:

- (a) Information in or derived from a record, report, or other instrument required to be furnished under this chapter is confidential and not open to public inspection, except for information set forth in a lien filed under this title or a permit issued under this chapter to a seller and except as provided by Subsection (c) of this section.
- (b) Information secured, derived, or obtained during the course of an examination of a taxpayer's books, records, papers, officers, or employees, including the business affairs, operations, profits, losses, and expenditures of the taxpayer, is confidential and not open to public inspection except as provided by Subsection (c) of this section.

It does not appear that the information at issue is derived from taxpayer reports required to be furnished under chapter 151. The requested information was submitted by businesses applying for amortization hearings. Additionally, no information is presented to this office which would place this information within the ambit of section 151.027(b) of the Tax Code as information secured, derived, or obtained during the course of an examination of a taxpayer's books, records, papers, officers, or employees. Thus, the requested information is not confidential pursuant to section 151.027.

Section 171.206 of the Tax Code pertains to franchise taxes and provides for the confidentiality of information obtained from a record or other instrument that is required by the franchise taxes provisions of chapter 171 to be filed with the comptroller. Additionally it provides for the confidentiality of information if it constitutes franchise tax information, including information about the business affairs, operations, profits, losses, or expenditures

of a corporation, obtained by an examination of the books and records, officers, or employees of a corporation on which a tax is imposed under the franchise provisions of the Tax Code. You have not explained to this office how the information at issue in the instant case pertains to franchise taxes and thus would be subject to section 171.206 of the Tax Code. Consequently, you may not withhold the information at issue under section 171.206 of the Tax Code. In conclusion, the cited statutes apply to state taxation while the submitted information relates to applications for city amortization hearings to which these provisions do not apply.

Since the property and privacy rights of third parties are implicated by the release of the requested information, this office notified the following eight businesses of the request: Top of the Strip, Natco, Inc., Wild Zebra, Conner's Jersey Lilly, Shotgun Willies, Rainbow Lounge, Babe's, and Adult Video. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *Open Records Decision No. 542 (1990)* (determining that statutory predecessor to Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

Top of the Strip, Conner's Jersey Lilly, Shotgun Willies, Rainbow Lounge, and Babe's failed to respond to the notice. Therefore, we have no basis to conclude that these businesses' information is excepted from disclosure. *See Open Records Decision Nos. 639 (1996) at 4* (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), *552 (1990) at 5* (party must establish prima facie case that information is trade secret), *542 (1990) at 3*. The requested information pertaining to these businesses must, therefore, be released to the requestor.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or

ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.²

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts’ interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government’s ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

Natco, Inc., Wild Zebra, and Adult Video argue that the requested information contained in their applications constitutes confidential commercial and financial information as well as trade secret information. We conclude that none of the three businesses has established that the information they seek to withhold is either a trade secret or confidential commercial or financial information that must be withheld. *See* Open Records Decision Nos.

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by *specific factual or evidentiary material*, not *conclusory or generalized allegations*, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish *prima facie* case that information is trade secret). Therefore, the city may not withhold the requested information under section 552.110.

Natco, Inc. and Adult Video further argue that, under section 552.101 of the Government Code, the requested information is *confidential*, "*constitutionally protected* information in that it pertains to businesses engaged in speech protected by the First Amendment." Section 552.101 excepts from disclosure "*information considered to be confidential by law, either constitutional, statutory, or by judicial decision.*" While the businesses may be engaging in speech permitted under the First Amendment, the businesses have not established that the requested information is excepted from public disclosure by the First Amendment. *Cf.* Open Records Decision No. 212 (1978). Thus, the city may not withhold the requested information under section 552.101 in conjunction with the First Amendment.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and *should not be relied upon as a previous determination regarding any other records*. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref: ID# 116201

Enclosures: Submitted documents

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